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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 287

RONALD J. ABBOUD,
Petitioner,

vs.

STATE OF NEBRASKA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Law Briefs—OMAHA LINO-SLUG PRINTING CO., 413 So. 15th St.

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Petitioner prays that this Court grant rehearing of its Order of October 9, 1967, denying the petition for writ of certiorari, — U.S. —; and that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska, in the above entitled case, as prayed for in the petition filed June 24, 1967.

REASON FOR GRANTING REHEARING AND ISSUING THE WRIT

With the denial of certiorari in this case, the Nebraska Supreme Court decisions in the cases of *State v. Adams,* 181 Neb. 75, 147 N.W. 2d 144 (1966);

State v. Abboud, 181 Neb. 84, 147 N.W. 2d 152 (1966); and *State v. Novak,* 181 Neb. 90, 147 N.W. 2d 156 (1966), stand as the law in Nebraska on the issues of eavesdropping, the right of privacy, grand jury selection, right to counsel and prejudicial publicity.

Petitioner's grounds for rehearing, of substantial and controlling effect, are as follows:

1. The Nebraska Supreme Court opinions[1] in this case approve the unauthorized recording of another's voice by electronic eavesdropping devices. Petitioner contends this is an invasion of the Constitutionally protected right of privacy under the Fourth Amendment to the Constitution.

In the present case, the record shows that the Omaha World Herald newspaper and a private citizen, without the aid, consent or knowledge of any law enforcement agency, set up electronic eavesdropping devices in a rented hotel room. Public officials and petitioner were invited to this room and were broached on the subject of, and readily offered, bribes; and all

[1]The opinion of the Supreme Court of the State of Nebraska was entered on December 16, 1966, and is reported at 181 Neb. 84, 147 N.W. 2d 152. Petitioner's case was consolidated for trial with indictments against Ernest Adams and Stephen Novak; and although each defendant appealed separately, in petitioner's case, the Supreme Court of Nebraska did not consider assignments of error common to the three appeals and discussed in the other opinions. It limited its opinion in petitioner's case to assignments of error not disposed of in the other opinions. Petitioner has, therefore, printed the opinions and judgments of the Supreme Court of Nebraska in all three cases in Appendix "A" to the Petition For Writ Of Certiorari.

of their conversations were recorded without their knowledge or consent. These recordings, containing hearsay statements, profanity and extra-judicial declarations of other individuals, who were not witnesses at the trial, were received in evidence and played for the jury in their entirety.

The present case is distinguishable from *Lopez v. United States,* 373 U.S. 427 (1963), where this Court held a government agent carrying a miniature tape recorder was lawfully in defendant's room because he had been invited there by defendant, and no Constitutional rights of defendant were impaired. Here, petitioner and others were lured to an electronically eavesdropped room, their conversations were recorded without their knowledge and the recordings were in the sole possession of the newspaper and other private individuals until trial time and then offered and received into evidence. This, we maintain, was a violation of the Fourth Amendment right of privacy; and the recorded evidence should have been excluded under *Silverman v. United States,* 365 U.S. 505 (1961).

The Nebraska Supreme Court opinions set a precedent for private individuals' electronic eavesdropping, and thereby justify concealed or contact microphones, permitting private individuals to set a trap, gather evidence, build a case and thereby violate a person's absolute right of privacy against any invasion of his person, house, papers and effects. The Nebraska Supreme Court opinions create the real and ominous

dangers that accompany the use of electronic eavesdropping devices and the erosion of Fourth Amendment protections.

2. The Nebraska Supreme Court, in this case, approved the systematic exclusion of certain classes of persons by unauthorized voir dire examination in empaneling grand jurors. The Grand Jury Board sent check sheets to prospective jurors, and then conducted a voir dire examination, using these sheets, where petitioner and others similarly situated, were identified as persons accused of crime; and all who knew petitioner and the others were disqualified from service, thereby creating an imbalance because those acquainted with the World Herald stories concerning the events in petitioner's case, and individuals hired by that newspaper to set up the events, were not disqualified.

Furthermore, the grand jury selected was caused not to be proportionately representative of the population from which it was drawn, in that members of certain races and classes were systematically excluded, in violation of *Thiel v. So. Pacific Company*, 328 U.S. 217.

All of the foregoing facts concerning the selection of the grand jury were alleged in petitioner's Plea In Abatement; and the State demurred. The demurrer was sustained. The Nebraska Supreme Court affirmed. Petitioner was therefore denied his Constitutional right to due process and equal protection under the Fourteenth Amendment.

3. Under Nebraska law, as established by this case, a person being investigated by a grand jury can be summoned before that grand jury and compelled to take an oath of secrecy, and can be denied the right to counsel. This is in direct conflict with this Court's decisions in *Gideon v. Wainright,* 372 U.S. 235; *Escobedo v. Illinois,* 378 U.S. 478; and *Miranda v. Arizona,* 384 U.S. 436.

In the present case, the record establishes that the investigation had centered on petitioner, the grand jury had been informed he was a person accused of a crime, he was summoned to appear before the grand jury to testify, required to take an oath of secrecy and denied the right to have counsel with him when he appeared. This was in violation of petitioner's right to effective assistance of counsel, guaranteed by the Sixth Amendment and Fourteenth Amendment.

Petitioner was thus placed in a situation where not to speak would seem to confess guilt to the grand jury. If he appeared without counsel and gave full utterance, he may build a case against himself and forfeit his privilege against self-incrimination. The state of this law cannot be permitted to stand in Nebraska.

4. Petitioner's Constitutional rights to due process and equal protection were denied when the Omaha World Herald newspaper instituted a calculated campaign to have petitioner indicted; set the stage by electronically eavesdropping a hotel room; recording

conversations; transcribing the purported tapes; editing the transcripts; assigning voice identifications and editorial matter and publishing the purported conversations in a full 5½ page story, all without the knowledge or consent of any law enforcement agency. This newspaper then continued its campaign against petitioner daily, in the only daily newspaper in Omaha, Nebraska, during the calling of the grand jury, its investigation prior to petitioner's trial; and it gave a play-by-play account during petitioner's trial, while the jury was not sequestered, and published its transcripts of the hotel room conversations, which transcripts had been carefully edited, and other history of the case; none of which was received in evidence during the trial except in the form of recordings which were inaudible, garbled and unidentified as to voices. This newspaper prosecuted the case.

In quantum of reported material, virulence of content and recklessness of method, we believe the actions and publicity in the case at bar far transcend the cases of *Sheppard v. Maxwell,* 384 U.S. 333; *Irvin v. Dowd,* 336 U.S. 716; and *Estes v. Texas,* 381 U.S. 532. In addition to this general condition, petitioner was grievously victimized by the deliberate, premeditated, specific malfeasance of one newspaper whose asserted purpose was to "get" petitioner.

Petitioner had a right to have the integrity of his jury protected; and nothing in the record can be offered to show a waiver of that right. *Fay v. Noia,* 372 U.S. 391.

Therefore, in the present case, we contend:

(a) The pre-trial publicity produced petitioner's trial and, at the same time, precluded the assembly of an impartial grand jury or trial jury.

(b) The publicity during trial prevented the maintenance of an impartial jury, if one had been empaneled.

(c) The contrived and malicious conduct of the Omaha World Herald before and during trial operated to deprive petitioner of due process of law and equal protection of the law.

CONCLUSION

For the reasons set forth above, and in the Petition For Writ Of Certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Nebraska.

Respectfully submitted,

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November 2, 1967

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition For Rehearing Of Order Denying Petition For Writ Of Certiorari is presented in good faith, and not for delay; and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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